

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

FREE SPEECH COALITION, INC., et al.)	CASE NO. 2:09-4607
)	
Plaintiffs,)	JUDGE MICHAEL M. BAYLSON
)	
-vs-)	
)	
THE HONORABLE ERIC H. HOLDER, JR.,)	<u>PLAINTIFFS' PRETRIAL</u>
Attorney General,)	<u>MEMORANDUM</u>
)	
Defendant.)	

STATEMENT OF NATURE OF CASE AND BASIS FOR JURISDICTION

Plaintiffs brought suit in this Court pursuant to 28 U.S.C. §§ 1331, 1346 (a)(2), and 2201, challenging the constitutionality of 18 U.S.C. §§ 2257, 2257A and their implementing regulations, 28 C.F.R. § 75.1, *et seq.* This case is before the Court on remand from the Third Circuit Court of Appeals for development of a factual record on three issues: (1) Plaintiffs' claim that the statutes are unconstitutionally overbroad; (2) Plaintiffs' claim that the statutes are not narrowly tailored to advance their purported interest in protecting children from sexual exploitation, and (3) Plaintiffs' claim that the inspection regime established by the statutes and their implementing regulations is unconstitutional under the Fourth Amendment.

STATEMENT OF FACTS

Plaintiffs submitted a Statement of Undisputed Facts (Doc. No. 145) in connection with their Motion for Summary Judgment on Their First Amendment Facial Overbreadth and Fourth Amendment Claims (Doc. No. 144). Plaintiffs adopt and incorporate this Statement of Undisputed Facts as part of this Statement of Facts on their overbreadth and Fourth Amendment claims.

As for their as-applied challenge to the statutes on narrow tailoring grounds, the Plaintiffs

provide this brief statement of additional facts.

Plaintiffs represent an array of individuals who produce sexually explicit expression depicting adults. They include photographers--the majority of whose work features people in their 30s and 40s and older whom no reasonable person could confuse as minors, Amended Complaint (Doc. No. 84) at ¶¶21-22, 35,-36, 40-43, 44-45, 48-49; they include producers of expression regarding issues of sexual health and fulfillment--the bulk of whose work depicts persons who are obviously beyond the age of majority, *id.* at ¶¶31-32, 37-39, 46-47, 50-51; they include members of the adult industry who have for years before the enactment of the laws at issue here fastidiously verified that the performers in their expression are adults. *Id.* at ¶¶18-20. Yet the laws impose their recordkeeping burdens--which are many--on each plaintiff, on penalty of prosecution and imprisonment, with equal force without regard to the age of the persons depicted in their expression. Title 18 U.S.C. § 2257, 18 U.S.C. § 2257A, and their implementing regulations are therefore not narrowly tailored to accomplish their purpose of preventing the sexual exploitation of children.

RELIEF SOUGHT

Plaintiffs seek a declaration that the statutes and their implementing regulations are unconstitutional under the First and Fourth Amendments and an injunction enjoining their enforcement.

NAMES OF WITNESSES¹:

Gene Mopsik
 Jeffrey Douglas
 Thomas Hymes
 Barbara Alper
 Linda Dian Wilson

¹ The addresses of the witnesses have been provided to Defendant in discovery.

Carol Queen
Barbara Nitke
David Steinberg
Marie Levine
Dave Levingston
Betty Dodson
Carlin Ross
Joy King
Charles Joyner
Daniel Linz, Ph.D.
Michelle Drouin, Ph.D.
Marc Zimmerman, Ph.D.

SCHEDULE OF EXHIBITS

This is a preliminary list of exhibits. The numbers and letters with which they are labeled for use at trial may vary somewhat from the list that follows.

Exhibit 1-	Agency, Serial 10- 2257 Inspection Report
Exhibit 2-	Bacchus, Serial 12- 2257 Inspection Report
Exhibit 3-	Darkside, Serial 11- 2257 Inspection Report
Exhibit 4-	Alexislord, Serial 18- 2257 Inspection Report
Exhibit 5-	All Good, Serial 13- 2257 Inspection Report
Exhibit 6-	Angry, Serial 18- 2257 Inspection Report
Exhibit 7-	Authentic, Serial 8- 2257 Inspection Report
Exhibit 8-	Candid, Serial 20- 2257 Inspection Report
Exhibit 9-	Cinema, Serial 15- 2257 Inspection Report
Exhibit 10-	Darkside, Serial 20- 2257 Inspection Report
Exhibit 11-	Deadmen, Serial 9- 2257 Inspection Report
Exhibit 12-	Diabolic, Serial 24- 2257 Inspection Report
Exhibit 13-	Dan Goo, Serial 16- 2257 Inspection Report
Exhibit 14-	EA, Serial 17- 2257 Inspection Report
Exhibit 15-	Evasive, Serial 16- 2257 Inspection Report
Exhibit 16-	Fifthelem, Serial 30- 2257 Inspection Report
Exhibit 17-	Gentlemens, Serial 15- 2257 Inspection Report
Exhibit 18-	Hotwired, Serial 15- 2257 Inspection Report
Exhibit 19-	Moonlight, Serial 8- 2257 Inspection Report
Exhibit 20-	Ponyboy, Serial 12- 2257 Inspection Report
Exhibit 21-	Private, Serial 21- 2257 Inspection Report
Exhibit 22-	Roberthill, Serial 18- 2257 Inspection Report
Exhibit 23-	Roberthill, Serial 41- 2257 Inspection Report
Exhibit 24-	Silverstar, Serial 10- 2257 Inspection Report
Exhibit 25-	SWS, Serial 14- 2257 Inspection Report
Exhibit 26-	Temptation, Serial 8- 2257 Inspection Report

- Exhibit 27- Tenner, Serial 7- 2257 Inspection Report
- Exhibit 28- Video JT, Serial 15- 2257 Inspection Report
- Exhibit 29- Wicked, Serial 22- 2257 Inspection Report
- Exhibit 30- Authentic Supplement
- Exhibit 31- Letters given to subjects of inspection by FBI
 - A. The Agency - 7-19-07
 - B. Alexis Lords Productions, Inc. - 9-17-07
 - C. Angry Young Man - 3-26-07
 - D. Shooting Star Video, aka Authentic Extreme Reality - 8-22-07
 - E. Bacchus, aka Filmco - 6-19-07
 - F. Cinema Play Entertainment - 6-27-07
 - G. Darkside - 3-19-07
 - H. Don Goo Enterprises - 5-11-07
 - I. Don Goo Enterprises - 5-22-07
 - J. Fifth Element, aka Ghost Pro Productions - 9-18-07
 - K. Gentlemen's Video - 7-19-07
 - L. Video J.T., aka J.T. Video - 5-31-07
 - M. Moonlight Entertainment - 3-21-07
 - N. Robert Hill Releasing Company - 3-19-07
 - O. Shane's World - 5-7-07
- Exhibit 32- Photos included in inspection report (209 Photos)
- Exhibit 33- FSC documentation of membership of members inspected
- Exhibit 34- 28 CFR §75.5 - May 24, 2005
- Exhibit 35- 28 CFR §75.5 - as amended December 18, 2008
- Exhibit 36- 18 U.S.C. §§2257, 2257A
- Exhibit 37- Declaration of William Livingston
 - A. Alt.com
 - B. AdultSpace.com
 - C. BeNaughty.com
 - D. SwingerZoneCentral.com
 - E. Iwantu.com
 - F. Upforit.com
 - G. Hookup.com
 - H. xxxBlackBook.com
 - I. Sexinyourcity.com
 - J. AmateurMatch.com
 - K. HornyMatches.com
 - L. Getiton.com
 - M. AshleyMadison.com
 - N. AdultFriendFinder.com
 - O. Letsbang.com
 - P. NaughtyConnect.com
 - Q. AdultMatchDoctor.com
 - R. Xdating.com

S.	Flirt.com
T.	Adam4Adam.com
U.	Collarme.com
V.	"Sex in Art: September 2012 Archive"
W.	"The Panhandler Project"
X.	"Alex Maxim: Art Nude Erotic and Bondage Photo Prints"
Y.	"The Nu Project"
Z.	"Online Alchemy-The Art of Loren Cameron"
AA.	"ErosArts," Webpages from
BB.	"Helmut Newton: White Women, Sleepless Nights, Big Nudes"
CC.	"Paul Knight: Intimate Couples,"
DD.	"NYPH09: Controversial Photographers"
EE.	"FeelmeL.A."
FF.	"Erotic Fine Arts" Webpages from
GG.	"David Rolin Pan-Erotic Photography,"
HH.	"Kevin Loreaux: Erotic Photographer"
II.	"China Hamilton: After Dark"
JJ.	"AMEA. World Museum of Erotic Art: K LEO Photographs"
KK.	"Erotic Rarities"
LL.	"Nude & Erotic Igor Amelkovich Photography"
MM.	"Tom Gallant Gallery,"
NN.	"Betty Tompkins"
OO.	"Mark Chester SF Gay Radical Sexual Photographer:
PP.	"Tony Ward"
QQ.	"Ghosts of Abu Ghraib," (Kennedy, 2007)
RR.	"Standard Operating Procedure," (Morris, 2008)
SS.	"A Few Bad Apples: Inside Abu Ghraib" (CBC) :
TT.	"Mourir a tue-tete" ("A Scream From Silence") (Anne-Claire Poirer 1978)
UU.	"Nes de la Haine" ("War Babies") (Raymond Provencher 2002)
VV.	"Calling the Ghosts: A Story about Rape, War, and Women," (Jacobson and Jelincic 1996)
WW.	"Bought and Sold: An Investigative Documentary About the International Trade in Women," (Gagster and Caldwell-Witness 1997)
XX.	"Sri Lanka's Killing Fields," (60-Minute Channel 4 U.K. 2011)"
YY.	"Sri Lanka's Killing Fields, War Crimes Unpunished,"
ZZ.	"Raw Deal: A Question of Consent " (Corben 2011)
AAA.	"Whores' Glory," (Glawogger 2011)
BBB.	"Passolini Prossimo Nostro," (Bertolucci 2006)
CCC.	"The Greatest Silence Rape in the Congo" (Jackson, 2007)
DDD.	"Hei tai yang: Nan Jing da tu sha" ("Black Sun: the Nanking Massacre") (T.F. Mou 1995)
EEE.	"Salo: The 120 Days of Sodom,"(Pasolini 1975)
FFF.	"Causalities of War," (DePalma 1989)

GGG.	"In the Land of Blood and Honey," (Jolie 2011)
HHH.	"The Accused," (Kaplan 1998)
III.	"Boys Don't Cry" (Peirce 1999)
JJJ.	"Disturbing New Photos from Abu Ghraib"
KKK.	"Primary Sources: Abu Ghraib"
LLL.	"The Abu Ghraib Prison Photos"
MMM.	"Libyan rebels say captured cell phone videos show rape, torture"
NNN.	"Nigerian Rape Video"
OOO.	"Inside the Anonymous Hacking File on the Steubenville 'Rape Crew'"
PPP.	"Nearly 1 in 5 Smartphone users are Sexting"
QQQ.	"Sexting Not Just for Kids"
RRR.	"Demand for Photo Erasing iPhone App Heats Up Sexting Debate"
SSS.	"Practice 'Safe Sexting' with SnapChat"
TTT.	"Top 5 Sexting Blackberry Apps"
UUU.	"Facetime Sex the Ultimate New Technology for Couples in Long Distance Relationships"
VVV.	"Instaporn: Porn, 'KikSex' Lurk Just Inside Instagram's Photo Eden"
WWW.	"Chatroulette is 89 Percent Male, 47 Percent American, and 13 Percent Pervert"
XXX.	"Even Celebs Do it for Attention"
YYY.	"The Rise of Virtual Sex"
ZZZ.	"The Skype is the Limit!"
AAAA.	"The New Pornographers"
BBBB.	"Sexting Commercials"
CCCC.	"Sexting Commercials"
DDDD.	"Sexting Commercials"
EEEE.	"Sexting Commercials"
FFFF.	"FBI reports"
GGGG.	"FBI Sexting: Leaked Disciplinary Report Details Bureau Employees Behaving Badly"
HHHH.	"An Internet Study of Cybersex Participants"
IIII.	"Boise State Study: 'Sexting and Sexual Relationships Among Teens and Young Adults'"
JJJJ.	"Oops! Most Homemade Pornography Ends Up Online"
Exhibit 38-	Report of Daniel Linz, Ph.D. and CV
Exhibit 39-	U.S. Census Table
Exhibit 40-	Report of Michelle Drouin, Ph.D. and CV
Exhibit 41-	Report of Marc Zimmerman, Ph.D. and CV
Exhibit 42-	Declaration of Kristi Witsman and Stipulation from <i>Connection Distributing</i>
Exhibit 43-	Photos of Barbara Alper produced in discovery and from <i>Cupido</i> (13 photos)
Exhibit 44-	"Orgasmic Women"
Exhibit 45-	"Selfloving: Portrait of a Women's Sexuality Seminar"
Exhibit 46-	"Viva La Vulva"
Exhibit 47-	"Celebrating Orgasm"

- Exhibit 48- "Sex Positions with Sex Toys"
- Exhibit 49- " Vulva Basics"
- Exhibit 50- "The Orgasm Doctor"
- Exhibit 51- Printouts from Genital Art Gallery on Betty Dodson's website
- Exhibit 52- Printouts from Betty Dodson's website
- Exhibit 53- "Bend Over Boyfriend: A Couple's Guide to Male Anal Pleasure"
- Exhibit 54- "Bend Over Boyfriend 2: Less Talkin', More Rockin'"
- Exhibit 55 - "Sexual Ecstasy for Couples"
- Exhibit 56- "Ecstatic Moments"
- Exhibit 57- "Carol Queen's Great Vibrations: An Explicit Consumer Guide to Vibrators"
- Exhibit 58- "How to Female Ejaculate"
- Exhibit 59- "Latex and Lace"
- Exhibit 60- David Steinberg - Photos Produced in Discovery (10 photos)
- Exhibit 61- David Steinberg - Additional Photos (392 photos)
- Exhibit 62- David Steinberg - photos from "Erotic by Nature" on nearbycafe.com (130 photos)
- Exhibit 63- David Steinberg - Spreadsheet produced in discovery
- Exhibit 64- Printouts from Daily Babylon
- Exhibit 65- David Levingston - Photo produced in Discovery (1 Photo)
- Exhibit 66- *The Figure in Nature* by David Levingston
- Exhibit 67- Calendar by David Levingston
- Exhibit 68- David Levingston - Additional Photos (164)
- Exhibit 69- Printouts of Webshows from Nina.com
- Exhibit 70- Barbara Nitke - Photos produced in Discovery (10 photos)
- Exhibit 71- Barbara Nitke - Photos appearing on barbaranitke.com (148 photos)
- Exhibit 72- *American Ecstasy* by Barbara Nitke
- Exhibit 73- Barbara Nitke - Additional Photos
- Exhibit 74- "Better Sex Guide: Great Oral Sex"
- Exhibit 75- "Provocative Sex Play"
- Exhibit 76- "Best of the Better Sex Collection"
- Exhibit 77- "The Art of Orgasm"
- Exhibit 78 - "Turn On's: How to Please Your Partner"
- Exhibit 79- "Great Sex for a Lifetime, Vol. One"
- Exhibit 80- "Great Sex for a Lifetime, Vol. Two"
- Exhibit 81- "The Couples Guide to Great Sex Over 40, Vol. 1"
- Exhibit 82- "The Couples Guide to Great Sex Over 40, Vol. 2"
- Exhibit 83- "Sex: A Lifelong Pleasure -Satisfying Her"
- Exhibit 84- "Sex: A Lifelong Pleasure - Satisfying Him"
- Exhibit 85- "Unlocking the Secrets of the G-Spot"
- Exhibit 86- "You Can Last Longer-Solutions for Ejaculatory Control"
- Exhibit 87- "A Man's Guide to Stronger Erections"
- Exhibit 88- "Sexual Positions for Lovers - Beyond the Missionary Position"
- Exhibit 89- "10 Ways to Go Longer and Stronger"
- Exhibit 90- "12 Ways to Boost Your Libido"
- Exhibit 91- "101 Positions for Lovers"

- Exhibit 92- "Better Sex Guide to the Kama Sutra"
- Exhibit 93- "Incredible Orgasms"
- Exhibit 94- "Better Sex Video Series, Vol. 1 (Advanced Techniques)"
- Exhibit 95- "Better Sex Video Series Vol. 2 (22 Sex Secrets)"
- Exhibit 96- "Better Sex Video Series Vol. 3 (Erotic Sex Play)"
- Exhibit 97- "Better Sex - Enjoying Guilty Pleasures"
- Exhibit 98- "Advanced Sex Play"
- Exhibit 99- "10 Ways to a Stronger Erection"
- Exhibit 100- "Toys for Better Sex"
- Exhibit 101- "Better Sex for Black Couples, Vol. 1"
- Exhibit 102- "Better Sex for Black Couples, Vol. 2"
- Exhibit 103- "Modern Loving"
- Exhibit 104- "Dr. Sandra Scantling's Discovering Extraordinary Sex, Vol.1"
- Exhibit 105- "Dr. Sandra Scantling's Discovering Extraordinary Sex, Vol. 2"
- Exhibit 106- "Dr. Sandra Scantling's Discovering Extraordinary Sex, Vol. 3"
- Exhibit 107- "Speaking of Sex"
- Exhibit 108- "Becoming Orgasmic"
- Exhibit 109- Printouts from Sinclair Institute.com
- Exhibit 110- December 7, 2011 Letter from DOJ to Congressman Lamar Smith
- Exhibit 111- Report to Congress submitted pursuant to Section 511 of the PROTECT Act
- Exhibit 112- Defendant's Supplemental Responses to Plaintiffs' First Set of Interrogatories, No. 2, 11
- Exhibit 113- Data regarding 2257 prosecutions
- Exhibit 114- Defendant's Supplemental Responses to Plaintiffs' Requests for Admission
- Exhibit 115- Defendant's Responses to Plaintiffs' Interrogatories Pertaining to Plaintiffs' Fourth Amendment Claim

ESTIMATE OF LENGTH OF TRIAL

The Court has scheduled trial to begin on June 3, 2013. The government is to be prepared to begin presenting testimony on June 7, 2013, with additional testimony to be presented on June 12-14, 2013 and June 17, 2013, if necessary. Rebuttal and surrebuttal, if necessary, are tentatively scheduled for June 17, 2013 and June 27, 2013.

OBJECTIONS TO EXHIBITS/EXPERT TESTIMONY

Plaintiffs reserve the right to object to the testimony of Janis Wolak and Gail Dines, Defendant's experts, under Rule 702, Federal Rules of Evidence and *Daubert v. Merrill Dow*

Pharmaceuticals, Inc., 509 U.S. 579(1993) at trial.

Defendant has not yet identified which exhibits he intends to introduce at trial. Plaintiffs reserve the right to object to them once they are identified.

Respectfully submitted,

Date: May 17, 2013

/s/ J. Michael Murray
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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2013, the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ J. Michael Murray

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